

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
(302) 856-5257

January 3, 2011

N440 State Mail
Jermaine King
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: State v. King
Defendant ID #0805039623 (R-1)

Dear Mr. King:

On September 17, 2010, you filed a Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). The record was expanded pursuant to Rule 61(g). The Court received your attorney's affidavits as to your allegations of ineffective counsel, as well as your December 17, 2010, response. This is the Court's decision as to your motion.

Following a bench trial, you were convicted of Possession With Intent To Distribute Cocaine, Trafficking Cocaine, Maintaining a Dwelling and two counts of Drug Paraphernalia. Sentencing took place on March 27, 2009, and you were found to be a Habitual Offender pursuant to 11 *Del. C.* 4214(a). The net result was a 20-year period of incarceration followed by probation.

The Supreme Court affirmed your conviction. *King v. State*, 984 A. 2d 1205 (Del.2009). The basis of your appeal was the denial of your suppression motion. Your attorney attacked the administrative protocol, or the failure to follow protocol, when a search is initiated by Probation and Parole. Also, your attorney argued the information from the informant was insufficient to form a basis for the search.

Rule 61 Allegations

_____ Defendant alleges his trial counsel was "adversely affected" in her role as defense counsel because she had been a prosecutor in an earlier conviction. He claims this resulted in her being ineffective.

He further alleges trial counsel was ineffective for failing to provide him the opportunity to fully litigate the Fourth Amendment claim, as well as failing to investigate the informant's credibility and reliability.

He further alleges that appellant counsel was ineffective for failing to argue on appeal that the Delaware Courts could not provide him a full and fair opportunity to litigate his Fourth Amendment claim unless the Courts were willing to reconsider conflicting case law pertaining to administrative searches by probation officers.

Procedural Bar

The Motion was timely filed but, as will be discussed below, the prior adjudications by the Court as to the administrative search impact the defendant's right to re-litigate this issue.

Ineffective Assistance of Counsel

To establish his trial attorney and appellant attorney were ineffective the defendant must prove that counsel committed errors or omissions in the performance of her responsibilities in representing him that actually caused him prejudice by impacting the outcome of the litigation. *Strickland v. Washington*, 466 US 668 (1984).

The defendant must make concrete allegations of cause and actual prejudice. *Younger v. State*, 580 A2nd, 552, 556 (Del. 1990).

Ground One

Defendant argues that his right to effective assistance of counsel was adversely affected because his defense attorney has previously been a prosecutor and obtained a conviction against him.

Mr. King alleges that he filed a letter with the Court in October 2008 raising defense attorney's involvement in his indictment and prosecution in 1997. He referenced the case being Case No. 9711014934.

Mr. King further alleges that this Court issued an order in October 2008 to determine if the conflict warranted separate counsel, but trial counsel ignored the Court's order. Finally, Mr. King alleges the Court dropped the ball in not following up on the conflict matter because another Judge presided at trial.

Defendant argues that the failure of trial counsel to respond to the Court's conflict inquiry was deficient performance. He argues her deficient performance in representing him is directly related to the conflict and resulted in putting up "no opposition whatsoever".

The Court's file does not support Mr. King's allegations. Mr. King states that the above-referenced letter is Docket No.14. In his letter to the Court he does complain about trial counsel, but it has nothing to do with her previous employment at the Attorney General's Office. He generally complains that his attorney is not doing enough for him and that he has proof the cocaine

belonged to someone else. [I note this is contrary to his statement to the police, which was introduced at trial.]

The Court responded to Mr. King's letter by correspondence dated October 28, 2008, which is Docket No.16. The Court advised Mr. King that his complaint letter was being forwarded to his attorney for any action deemed appropriate by her. The Court further advised Mr. King that his lawyer's job was to represent him to the best of her ability, but that she also was not to file frivolous motions.

Specifically, the Court did not direct her to respond to the Court concerning any issues involving conflict of interest. Thus, Mr. King's specific and concrete allegations are factually incorrect and his claim must be dismissed.

Additionally, trial counsel reports she was a Deputy Attorney General up until April 2004, when she joined the Public Defender's Office. She also acknowledges that she was the prosecutor in Case No. 9711014934. She specifically denies that her previous job as a prosecutor in any way created a conflict of interest as to Mr. King.

Trial counsel reports that she first learned of Mr. King's conflict of interest complaint when the defendant wrote to the Supreme Court in May 2009 alleging that she was not diligent in her responsibilities because of her prior employment.

Finally, she advises that until Mr. King raised this issue she had not remembered prosecuting him in 1997.

The defendant responded by alleging that she had to know about this 1997 case because she knew he had a criminal record going back to when the defendant was eighteen years old and also she was aware of the habitual offender motion.

The Court's official docket for Case No. 9711014934 evidences that the defendant was arrested on November 24, 1997, and pled guilty at the first case review calendar two months later, on February 3, 1998, to possession of a deadly weapon by a person prohibited. Based upon the plea recommendations, he was sentenced immediately to eleven months at supervision level 5, followed by probation. It is doubtful his trial attorney would recall this case. She has handled hundreds of cases before and after the 1998 conviction.

A review of the habitual offender motion evidences that the above case was not one of the felony convictions forming the basis of a sentence pursuant to 11 *Del. C.* 4214(a). The triggering convictions were felony drug convictions and an aggravated menacing conviction.

A review of the Superior Court file and the transcript of the suppression hearing convinces me that his trial attorney was extremely zealous and effective in doing her best to represent him. An unsuccessful outcome does not mean she was ineffective.

Pursuant to *Hitchens v. State*, 931 A.2d 437, 2007, WL 2229020 (Del. Supr), the defendant has not established clear and convincing evidence that his trial attorney's prosecution of him for a criminal offense occurring ten years prior to his conviction in this case was a conflict of interest. Nor has he demonstrated how the alleged conflict of interest prejudiced the fairness of the proceedings resulting in his conviction.

Ground One is DENIED.

Ground Two

This claim of ineffectiveness is based on allegations that his attorney failed to investigate and develop evidence that would have supported his position at the suppression hearing and at trial.

To a great degree the defendant uses this allegation as a vehicle to re-argue the decision denying the motion to suppress, as well as the adjudication by the Supreme Court that the suppression ruling was correct.

More background is necessary to evaluate this claim. Trial counsel made a *Flowers* motion to obtain the identity of the informant who assisted the police in setting up the buy. That motion was denied. The informant's identity was not provided to the defense.

Nevertheless, the defendant complains that trial counsel's investigation should have uncovered the identity of the informant and then attacked the informant's reliability.

Since the Court did not order disclosure of the informant, I find that counsel was not ineffective for failing to learn the identity of the informant by some other investigation. Likewise, she was not ineffective for failing to investigate the informant's cell phone records. This allegation borders being frivolous.

Finally, I note that the transcript of the suppression hearing and bench ruling, as well as the Supreme Court's decision, establish that the defendant cannot meet his burden of proof as to prejudice. The State's case was factually strong. It was the legal issues concerning the nighttime administrative search without the written checklist that was the focal point of the suppression motion and appeal.

Ground Two is DENIED.

Ground Three

The defendant alleges his appeal counsel was ineffective for failing to argue to the Supreme Court that in order to provide him a fair opportunity to litigate the suppression ruling the Supreme Court would have to resolve its conflicting case law.

I find the defendant's allegation that the "too many conflicting rulings" created a structural defect which prevented him from fairly litigating his Fourth Amendment claim to be conclusory.

Appellant counsel zealously represented the defendant and effectively pushed the envelope in this area of administrative searches by probation officers. The Supreme Court's decision is the proof of her efforts. Again, being unsuccessful does not equate to ineffectiveness.

Finally, the Supreme Court has fully adjudicated the issues raised in the defendant's motion. Mr. King can show no prejudice.

Ground Three is DENIED.

Conclusion

For the above reasons the defendant's Motion for Postconviction Relief is DENIED.

SO ORDERED

Your very truly,

/s/ T. Henley Graves

THG:pac

cc: Prothonotary
Stephanie Tsantes, Esquire
John Donahue, Esquire